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NO. 88-1120

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

JOHN W. WILLIAMS and WINIFRED WILLIAMS, husband and wife,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, a political subdivision of the State of Arizona; THOMAS J. CASTILLO, EVA BACAL, THOMAS WRIGHT, LAURA ALMQUIST, RAUL GRIJALVA, MERRILL GRANT, in their capacities as members of the School Board TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an amendment to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("the ADEA"), which removed the maximum age covered by the ADEA, and which became effective on January 1, 1987, should be applied retroactively to a person who was mandatorily retired in 1983 and who never filed a lawsuit under the ADEA.

2. Whether a school district policy (now repealed) which required an employee, before being permitted to continue his employment past the state's mandatory retirement age, to show that (a) his performance over the 24 months preceding retirement was superior, (b) his retirement would prove injurious to the welfare of students in general, and c) he would be difficult to replace, was so vague that his lawyer had no notice of what she was required to show at a hearing before the district's Governing Board.

LIST OF PARTIES

Pursuant to Supreme Court Rule of Practice 40.3, Respondents Thomas J. Castillo, Thomas Wright, Laura Almquist, Raul Grijalva and Merrill Grant, who were public officers and employees and parties to the proceedings below in their official capacities, and who have ceased to hold their public offices, should be removed from this case and the following parties substituted: Susan S. DeArmond, Robert A. Strauss, Joel T. Ireland, Sylvia Campoy and Paul D. Houston. Eva Bacal who was a party in her official capacity to the proceedings below still holds her office and, therefore, is a party to these proceedings.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Tucson Unified School District No. 1 of Pima County and the members of its governing board and its superintendent (hereinafter collectively "TUSD") request this Court to deny the Petition for Writ of Certiorari seeking

review of the decision of the Arizona Court of Appeals, Division Two, in this case.

RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS

The facts of this case are simple. Petitioner John Williams ("Williams") was a counselor, employed by Tucson Unified School District No. 1 of Pima County, Arizona ("TUSD"). Williams turned seventy years old in 1983. Arizona law at the time provided for mandatory retirement of teachers at age seventy, and required political subdivisions of the state, such as TUSD, to have a process by which such employees could request to continue their employment. When Williams inquired about an extension of his employment beyond the contract year in which he turned seventy, counsel for TUSD discovered that TUSD's existing policy on continuation of employment did not comport with current state law. As a result, the TUSD Governing Board ("the Board") adopted new Policy 4080 ("the Policy" or "Policy

4080") and informed Williams of its adoption.

Williams applied for continued employment pursuant to the Policy. His application was denied at the administrative level. He then requested and received a hearing before the Board. At the hearing, Williams was represented by counsel who called witnesses, cross-examined the administration's witnesses, introduced exhibits, and argued to the Board. The Board denied Williams' application.

Williams then filed a lawsuit. His complaint alleged various contractual, constitutional and state law violations, but never mentioned the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., ("ADEA"). After judgment was granted for TUSD and against Williams, including an award to TUSD of $10,000.00 for attorneys' fees, Williams requested reconsideration, relying in part on a then-recent amendment to the ADEA. His motion for reconsideration was denied. He then appealed to the Arizona

Court of Appeals. That court affirmed, and awarded attorneys' fees to TUSD on appeal. Williams moved for reconsideration, which was denied. He then petitioned for review in the Arizona Supreme Court, which was denied.

Williams now petitions this Court for a Writ of Certiorari to the Arizona Supreme Court ("Petition"). Because Williams' Petition "summarizes" almost every argument he made in the Arizona Court of Appeals and the trial court (see Petition ("Pet.") at 10-11 and 14-39), it is not absolutely clear which issues he is attempting to raise in this Court. TUSD, however, generally will ignore any extraneous issues that are discussed in Williams' "Statement of the Case," and will assume that the only issues on which he is seeking this Court's review are those which are set forth in the "Questions Presented for Review" portion of his Petition. Those issues, briefly stated, are 1) whether the Arizona Court of Appeals was incorrect as a matter of federal law

when it refused to apply a 1986 ADEA amendment retroactively to Williams and 2) whether TUSD's Policy 4080 (now repealed) was so vague that it denied Williams due process of law. The answer to both questions is "no."

WILLIAMS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

In an attempt to persuade this Court that adequate reasons are present which require review of the Arizona Court of Appeals' decision, Williams argues that the Court of Appeals' decision was "contrary to applicable U.S. Supreme Court decisions," Pet. at 40, and that "interpretations set forth in lower court opinions...have not been specifically espoused by the United States Supreme Court." Id. The Arizona Court of Appeals did not misapply this Court's decisions. In addition, merely because lower federal courts have interpreted something (exactly what is not made clear in Williams' Petition) in ways not "specifically espoused" by this Court is an insufficient reason for this Court to

grant review. The issue of the retroactive application of the ADEA amendments to a man who never even filed suit under the ADEA is unlikely to recur and is of no special legal significance warranting review by this Court. Moreover, whether or not words such as "superior" in a local school district's employment policy (which policy no longer exists) are unconstitutionally vague is not the kind of issue that warrants this Court's attention. An analysis of Williams' arguments reveals that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. THE ARIZONA COURT OF APPEALS WAS CORRECT WHEN IT REFUSED TO APPLY THE 1986 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT RETROACTIVELY TO INVALIDATE AN ACT THAT WAS LAWFUL WHEN UNDERTAKEN.

In 1983, after a full adversarial hearing, the TUSD Governing Board denied Williams' application for continued employment pursuant to its Policy and state law. Williams was 70 years old. At the time, the ADEA did not apply to persons age

70 or older. 29 U.S.C. § 631(a). Three years later in November, 1986, Congress amended the ADEA. P.L. 99-592. The amendments took effect on January 1, 1987, with certain exceptions not applicable to this case. Id. § 7. The ADEA now applies to all persons age 40 and over, with no upper limit. Id. § 2(c). Mandatory retirement because of age generally is now prohibited. Williams wants the amendment applied to him.

Williams never alleged a violation of the ADEA in his complaint. Nevertheless, he argued to the trial court that he had a "pending case" within the meaning of this Court's precedents and that therefore, the ADEA amendment should be applied anyway, so he would get his job back, with back pay. The Arizona courts did not agree.

This Court has addressed the issue of the retroactive application of federal law to pending cases three times in detailed opinions. United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Thorpe

v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); and Bradley v. Richmond School Board, 416 U.S. 696 (1974). Williams says that the Arizona Court of Appeals misapplied these cases. Williams is wrong.

In this Court's cases on retroactivity, either the plaintiffs had a pending case under the old law when the law was amended, or the new legislation provided only a new remedy. None of this Court's "retroactivity" cases made an act that was lawful when done unlawful because of the new law. For example, The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) involved the condemnation of a French vessel. The Court applied a new convention with France, which stated that all property that had not yet been "definitively condemned" on the date the convention was signed was to be returned to its owner. Id. at 107 (emphasis in original). In The Schooner Peggy, the United States had a "pending case" under a law that was superseded by the convention.

When the convention was adopted, the vessel at issue had not yet been "definitively condemned." John Williams would like this Court to apply the ADEA amendments as if they read, "any employee who has not been definitively retired shall be reinstated." The ADEA, of course, says no such thing. John Williams was lawfully retired prior to the ADEA amendment. The Schooner Peggy does not apply.

Williams' cited cases "applying" The Schooner Peggy (see Pet. at 41-42) have nothing to do with the issues in this case. Dinsmore v. Southern Express Co., 183 U.S. 115 (1901), held that because a statutory change removed the basis for a regulatory commission's order, an injunction against its enforcement was no longer necessary. In Watts, Watts & Co. v. Unione Australiaca, 248 U.S. 9 (1918), the Court cited The Schooner Peggy as authority for accepting jurisdiction in a discretionary jurisdiction case. Id. at 21. The supervening change requiring the Court to accept jurisdiction

was the fact that the United States and Austria-Hungary were at war. Id. Crozier v. Krupp, 224 U.S. 290 (1912), held that because there was a new remedy at law, an injunction was not necessary. Ziffrin, Inc. v. United States, 318 U.S. 73 (1943), held that a change in law pending an administrative hearing must be followed in granting or denying permits for future acts. Id. at 78. These cases, therefore, have no applicability to the facts in our case.

This Court's next major retroactivity case, Thorpe v. Housing Authority, 393 U.S. 268 (1969), involved the eviction of a tenant from federally funded housing. The tenant had argued that her eviction without due process violated the fifth amendment. New eviction procedures, promulgated while the case was pending, provided a due process remedy. This Court stated that the new procedures were to be applied before evicting any tenant, including the plaintiff, still residing in the housing. Id. at 283 (emphasis added). Our case is different.

The ADEA amendments are not procedural and Williams is not "still on the job." Therefore, Thorpe does not have any application to the present situation.

The next major retroactivity case was Bradley v. Richmond School Board, 416 U.S. 696 (1974). Bradley affirmed and explained the rule that, with certain important exceptions, new legislation is to be applied to pending cases. For reasons that are difficult to explain, however, statements in this Court's cases both before and after Bradley appear not to apply this rule. For example, four months before Bradley was decided, this Court addressed the issue of the mandatory termination provisions of two school boards' maternity regulations. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). The Court pointed out that during the pendency of the case, Title VII of the 1964 Civil Rights Act was amended. Id. at 638 n. 8. The Court then stated:

> While the statutory amendments and the administrative regulations

> are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

Id. More recently, this Court stated in an opinion involving the retroactivity of a provision of the Bankruptcy Reform Act of 1978 that:

> The principle that statutes operate only prospectively...is familiar to every law student....
>
> ***
>
> "The presumption is very strong that a statute was not meant to act retro-spectively, and it ought never to receive such a construction if it is susceptible of any other."

United States v. Security Industrial Bank, 459 U.S. 70, 79-80 (1982) (citations omitted). Nevertheless, Williams insists that Bradley should apply here.

Bradley involved an award of attorneys' fees in a school desegregation case. The statute that was applied retroactively concerned precisely that issue: the award of attorneys' fees in school desegregation cases. The statute merely provided a new remedy for acts that already had been

determined to have been unlawful when they were undertaken. Our case is different. The ADEA, if applied retroactively to Williams, makes unlawful an act that was lawful when done. Bradley, therefore, is easily distinguishable.

Williams argues that the Arizona Court of Appeals also misapplied United States v. Alabama, 362 U.S. 602 (1960), and relied instead on cases like Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975). Pet. at 45. He says that United States v. Alabama allowed a new substantive cause of action. This is not so. United States v. Alabama did not make unlawful an act that was lawful when undertaken. United States v. Alabama involved a change of law permitting the United States to bring a "pattern and practice" suit against a state for denying voting rights. The statutory change did not affect the state's substantive obligation not to deny the right to vote. It merely provided that the state, rather than only its officials, could be

made a formal party to the litigation. In addition, the United States already had filed an amended complaint naming the state. The case, in effect, allowed the amendment of the complaint. United States v. Alabama, therefore, does not stand for the proposition that an act that was lawful when undertaken can be made unlawful by retroactive application of a statute.

Williams' Complaint never alleged a claim under the ADEA. He is not seeking to have new legislation applied to give him new procedures or a new remedy[1] for already unlawful conduct. What he is seeking is a

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[1] An example of seeking a new remedy would be if Williams had been retired mandatorily at age 68 and he had filed a lawsuit under the ADEA, but turned 70 while the suit was pending. Assume that the court determined that the Board's decision to retire Williams at age 68 violated the ADEA as in effect when he was retired. Then assume that while the case was pending, the ADEA amendment was passed. Finally, assume that TUSD argued that, although it might be liable for back pay from age 68 to 70, it would not be liable for back pay after Williams reached age 70 and that it would not have to reinstate him. The ADEA amendment then might apply, and TUSD might have to reinstate him with full back pay. The issue would be one of remedy for an act that was unlawful when it was undertaken.

chance to try to persuade this Court to say that "even though TUSD did not act unlawfully when it acted, we will apply the ADEA amendment retroactively to say that it acted unlawfully." He also is arguing essentially that "even if I didn't allege a violation of ADEA in my complaint, and even though I never went through the procedures required before I could sue under ADEA, the Court should rule that TUSD violated the ADEA and should give me my job back." No case supports this kind of retroactive application.

Under the ADEA, no suit may be filed until sixty days after the employee has filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the appropriate state agency (in deferral states). 29 U.S.C. §§ 626(d) and 633(b). The state agency in Arizona is the Arizona Civil Rights Division of the Attorney General's office ("ACRD"). Williams has never filed a charge with the EEOC, let alone within three hundred days of the

"challenged practice." See 29 U.S.C. § 626(d)(2). The limitations begin to run on the date when the decision concerning a challenged employment practice is made and communicated to the employee, not when it takes effect. Chardon v. Fernandez, 454 U.S. 6 (1981), aff'd, 462 U.S. 650 (1982). Filing such a charge is a condition precedent to bringing a civil action under ADEA. 29 U.S.C. § 626(d)(1) and (2). In addition, Williams never filed a charge with the ACRD, which also was required. Oscar Mayer Co. v. Evans, 441 U.S. 750 (1979). Finally, even assuming for purposes of this argument that TUSD's "violation" was "willful," Williams never filed suit under the ADEA, and the three-year statute of limitations has passed. 29 U.S.C. § 626(e).

Williams wants the substantive provisions of the ADEA retroactively applied to him, without also having the procedural provisions applied. If the ADEA applies to him, the entire ADEA, and not only its substantive provisions, must apply. Because

Williams has not met the procedural prerequisites to filing suit under the ADEA, and because he never brought suit under the ADEA, the ADEA does not apply. The Arizona Court of Appeals correctly ruled.

Williams argues that the Arizona Court of Appeals "avoided the full Bradley . . . test." Pet. at 44. Although the Arizona Court of Appeals may not have addressed the three-part Bradley test in quite the form that Williams would like, a step-by-step application of the test requires the same result as was reached by the Arizona Court of Appeals.

In determining whether legislation should be applied retroactively, the Court first looks to the language of the statute. If this does not provide a clear answer, the Court then must look to the legislative history. If this still does not provide a clear answer, the Court then must determine whether the retroactive application would result in a "manifest injustice." Bradley, supra, at 711 (1974).

Congress specifically provided that the amendment at issue here was to take effect on January 1, 1987. P.L. 99-592 § 7(a). One exception was set forth in § 7(b) which states that:

> Effect on existing causes of action. -- The Amendments made by Sections 3 and 4 of this Act shall not apply with respect to any cause of action arising under the Age Discrimination in Employment Act of 1967 as in effect before January 1, 1987.

In enacting this exception to the effective date of the legislation, Congress intended to insure that the amendments would not destroy a cause of action already existing under the prior version of the ADEA. Section 7(b) does not mean that all other amendments to the ADEA would be retroactive, whether or not a plaintiff had an "existing cause of action" under the prior version of the ADEA. If anything, § 7(b) implies only that the other amendments might be retroactively applied in a case where a plaintiff did have an "existing" cause of action under the prior version of the ADEA. John Williams, of course, had no such

"existing cause of action" under the ADEA as in effect before January 1, 1987. He did not, and could not, have had such an "existing cause of action" arising under the ADEA before amendment, because before the amendment, ADEA did not apply to persons age 70 or older. Therefore, Congress should be taken at its word. The ADEA amendment became effective on January 1, 1987. Williams was mandatorily retired years prior to that. The ADEA amendment does not apply to him.

The legislative history provides some, although little, guidance. The one reference in the Congressional debate that touches on the retroactive application of the amendments was when Senator Moynihan stated:

> This bill will allow the 78,000 over 70 <u>who are still working</u> to continue to do so and it will permit the 177,000 Americans between 65-70, <u>who are still working</u> - but might have had to retire in the next 5 years to do so as well.

132 Cong. Rec. No. 143, part II, S16856 (Daily Ed. October 16, 1986) [emphasis

added]. John Williams was not "still working" when the amendments became effective.

If the wording of the statute and the legislative history are inconclusive on the issue of retroactivity, the question becomes whether or not retroactive application of the amendment would create a manifest injustice. This determination involves an analysis of (a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law on those rights. Bradley, 416 U.S. at 717. Applying this analysis to Williams' situation leads to the conclusion that the ADEA amendments should not be applied retroactively.

As to the first factor, the nature and identity of the parties, the defendant in this case, as in Bradley, is a public school board. Merely because Williams was employed by a public rather than a private entity, however, should not mean that the first Bradley factor should weigh in his favor.

The Bradley Court specifically recognized the possibility that lawsuits involving public entities might, in some circumstances, be viewed as routine private litigation. 416 U.S. at 718. See also, Brooks v. United States, 757 F.2d 734, 743 (5th Cir. 1985) ("Although the suit here involves the United States, it acts much like a private party in the instant case."). Even though this case involves a public entity, it is actually no more than a garden-variety lawsuit between an employee and employer. See, Marshall v. Delaware River and Bay Authority, 471 F.Supp. 886, 891 (D.Del. 1979).

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retro-spective operation, affect the rights of parties. . .

The Schooner Peggy, 5 U.S. (1 Cranch) at 110.

If Williams had worked for a private employer, there would be almost no question

but that the amendment would not be applied retroactively. Unlike the statutes, treaty or regulations at issue in The Schooner Peggy, Thorpe, United States v. Alabama, or Bradley, the ADEA applies to most private as well as public employers. If the amendment is retroactive only for public, but not for private, employers, the result would be absurd -- for no rational reason, some people over age 70 would go back to work, while others would not. Thus, when analyzing "the nature of the parties," the Court should focus on the employer-employee relationship, and not on the fact that TUSD is a public entity.

The Court in Bradley next directed an inquiry as to the nature of the rights of the parties. 416 U.S. at 721. In Bradley, the Court emphasized that the school board had engaged in a conscious course of conduct with the knowledge that, under already existing theories, it could have been required to pay attorneys' fees. Id. Rather than creating a whole new area of

liability, the statutory amendment addressed in Bradley merely served to create an additional remedy, attorneys' fees, for a preexisting wrong. The Court also noted that permitting attorney fees would provide an incentive to institute legal actions to cure illegal conditions. In the instant case, there were no illegal conditions to be "cured."

TUSD did nothing unlawful when it decided not to continue Williams' employment beyond age 70. The rights and obligations of John Williams and TUSD were fixed and in place in 1983 when Williams' application for continued employment was denied. "In such circum-stances, post-Bradley cases have declined to apply new law to pending cases." Sikora v. American Can Co., 622 F.2d 1116, 1123 (3d Cir. 1980).

Finally, the Bradley Court looked to the nature of the impact of the change in law upon the rights of the parties. The Court noted that

> [n]o increased burden was imposed since [the attorneys' fees

> statute] did not alter the Board's constitutional responsibility for providing pupils with a non-discriminatory education. Also, there was no change in the substantive obligation of the parties.

416 U.S. at 721. In our case, unlike Bradley, the amendment to ADEA changed the substantive obligation of all employers covered by the ADEA. The amendment, therefore, should not be retroactively applied. See Marshall v. Delaware River and Bay Authority, supra, 471 F. Supp. at 891; see also, DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282, 1283 (5th Cir. 1986) (As Plaintiff's "dismissal occurred prior to the effective date of the curative amendment, [he] failed to state a claim upon which relief can be granted [under ADEA]."). Retroactive application of the ADEA amendment in this case would impose liability for an act lawful at the time it was done.

The case of United States v. Hill, 676 F.Supp. 1158 (N.D. Fla.), cited by Petitioner, does not help him. There, the Court applied certain statutory amendments retro-

actively. In doing so, however, the Court expressly noted that

> the amendments...do not prohibit something that was previously lawful.

Id. at 1170. In our case, however, the amendment does precisely that: it now generally prohibits mandatory retirement at any age, while the version of the statute in effect when John Williams was retired did not apply to persons age 70 or older. The Court, therefore, must "struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties." The Schooner Peggy, 5 U.S. (1 Cranch) at 110.

Williams argues that the Arizona Court of Appeals, rather than applying the Bradley test, relied on cases like Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975). In Weise, a professor alleged a claim under Title VII and wanted an amendment retroactively applied to her. Prior to the amendment, employees of educational institutions were not covered by Title VII.

The Court refused to apply the amendment retroactively to create a new right where none previously existed. Id. at 411. Although the Court in Weise did not engage in a long discussion of the Bradley test, it did expressly find that retroactive application of the Title VII amendment would, in that case, be manifestly unjust, citing Bradley. Id. See also, Wolf v. J.I. Case Co., 617 F.Supp. 858 (E.D.Wis. 1985) (refusing to apply ADEA amendments retroactively to pre-amendment mandatory retirement). Here, as in Weise and Wolf, the legislation created new substantive rights and obligations. To apply the new legislation retroactively to invalidate an act that was lawful when done would be manifestly unjust. The Arizona Court of Appeals correctly decided the retroactivity issue. There is no reason for this Court to review that decision.

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B. THE ARIZONA COURT OF APPEALS WAS CORRECT WHEN IT RULED THAT WILLIAMS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

Williams next says that the Arizona Court of Appeals misapplied this Court's due process rulings. Pet. at 52. TUSD never has argued that Williams did not have some sort of protectable liberty or property interest requiring due process. It gave him due process. There was a hearing. His attorney represented him. He called witnesses. He cross-examined witnesses. His lawyer made objections. Oral argument was afforded. Written argument was allowed. Williams says, however, that TUSD failed to give him proper notice. Pet. at 56.

Policy 4080 required Williams to show that his performance over the 24 months preceding retirement was superior; that his retirement would prove injurious to the welfare of students in general; that he would be difficult to replace. Williams says that these requirements were so "vague," he had no "notice" of what, "the policy required him to prove, and deprived

him of the ability to present meaningful evidence and an opportunity to be heard in a meaningful manner." Pet. at 57. This argument is ludicrous. In addition, and just as important, whether or not words such as "superior" or "difficult to re-place," when used in a school district employment policy that no longer exists, is not the kind of issue that warrants this Court's attention.

Policy 4080 applied to all employees of TUSD. It applied to the superintendent; it applied to principals; it applied to teachers; it applied to secretarial and custodial staff. Because of this, words such as "superior" cannot be defined with absolute precision in the Policy itself. This is the nature of language. Due process, however,

> "does not demand unobtainable feats of statutory clarity," United States v. Maude, 481 F.2d 1062, 1068 (D.C. Cir. 1973), and ...." absolute precision in drafting laws is not demanded," particularly where the law does not

> impose a criminal penalty. High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1229 (11th Cir. 1982).

Planned Parenthood of Central and Northern Arizona v. Arizona, 718 F.2d 938, 948 (9th Cir. 1983). As long as the words can be defined and fleshed out in the context in which they will be applied, due process is not violated.

Evidence was presented at the hearing on each of the requirements set forth in Policy 4080. For example, witnesses familiar with counseling testified as to what they thought the attributes of a "superior" counselor were. Administrators testified as to the attributes of a "superior" employee. Nothing prohibited Williams from attempting to refute their definitions. Nothing prohibited him from calling his own witnesses to testify about the attributes of a superior counselor or employee. Nothing prohibited him from then showing that he had those attributes. In fact, Williams did present evidence

concerning the attributes of a superior counselor. Merely because the TUSD Governing Board may not have agreed with his evidence, or decided that Williams did not have those attributes, does not render the Policy unconstitutionally vague. The same is true for the other two prongs of the test set out in Policy 4080. Williams was not denied due process. Policy 4080 was not unconstitutionally vague. The Arizona Court of Appeals correctly ruled.

CONCLUSION

For the reasons stated above, there is no issue in this case that warrants review by this Court. This Court should deny Williams' Petition for Writ of Certiorari.

DATED this 18th day of January, 1989.

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CERTIFICATE OF SERVICE BY MAIL

I, DENISE M. BAINTON, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 18th, 1989, I served Respondents' Brief in Opposition to Petition for Writ of Certiorari by causing to be deposited three (3) copies thereof, enclosed in a sealed envelope with First Class postage thereon fully prepaid, at a United States Post Office mailbox in Tucson, Arizona, addressed as follows in accordance with Rule 28 of the Rules of the United States Supreme Court:

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and filed same causing to be deposited the original and forty (40) copies thereof, enclosed in a sealed box with First Class postage thereon fully prepaid, at a United States Post Office at Tucson, Arizona, addressed as follows in accordance with Rule

28 of the Rules of the Unites States Supreme Court:

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
Washington, D.C. 20543

DATED this 18 day of January, 1989.

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SUBSCRIBED AND SWORN to before me this 18th day of January, 1989 by DENISE M. BAINTON.

Joan E. Reynolds
Notary Public

My Commission Expires:
January 10, 1992

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